(3)

No. 85-5348

In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID BUCHANAN, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 12, 1985
CERTIORARI GRANTED MAY 27, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	DOCKET ITEM
November 5, 1981	David Buchanan indicted for murder and other offenses.
February 25, 1982	David Buchanan moves the Court to bar "death qualification" of jury at guilt/innocence phase and/or for separate juries for guilt and punishment with no "death-qualification" of the guilt/innocence jury.
March 2, 1982	Prosecution responds to death-qualification motions.
March 4, 1982	David Buchanan was reindicted by a Jefferson County Grand Jury for murder, robbery, rape, sodomy and kidnapping.
March 9, 1982	Pre-trial hearings. Challenge to "death-qualification" rejected.
July 15, 1982	David Buchanan moves to preclude death as punishment.
July 28, 1982	Capital portion of indictment dismissed as to David Buchanan upon agreement of Commonwealth.
August 2-13, 1982	David Buchanan convicted and given maximum available sentences by a "death-qualified jury: (over his objection) Life, 20, 20, 20 (to be served consecutively).
September 17, 1982	David Buchanan sentenced to life and 60 years imprisonment. Final judgment entered.
June 13, 1985	Supreme Court of Kentucky affirms David Buchanan's convictions and sentences.

THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
CRIMINAL DIVISION

MARCH TERM A.D., 1982

82CR0406-3

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD
DAVID BUCHANAN

1—MURDER (BOTH)
KRS 507.020 Capital Offense
Death or 20 years to Life

2—ROBBERY I (BOTH)
KRS 515.020 Class B Felony
10 to 20 years
COMPLICITY
KRS 502.020

3—RAPE I (BUCHANAN)
KRS 510.040 Class B Felony
10 to 20 years

4—SODOMY I (BOTH)
KRS 510.070 Class B Felony
10 to 20 years

5—RECEIVING STOLEN PROPERTY OVER $100
KRS 514.110 Class D Felony
1 to 5 years (Stanford only)

6—KIDNAPPING (Buchanan only)
KRS 509.040 Class B Felony
10 to 20 years

SUPERCEDING INDICTMENT

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed the capital offense of murder by intentionally or wantonly causing the death of Baerbel Poore by shooting her with a pistol.

COUNT TWO

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree robbery by threatening the use of physical force upon Baerbel Poore, while armed with a pistol, and in the course of committing a theft at the Checker Oil Station.

COUNT THREE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan committed first-degree rape by engaging in sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FOUR

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree sodomy by engaging in deviate sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FIVE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, Kevin Stanford, committed the offense of receiving stolen property by having in his possession property, of the value of $100 or more, that had been stolen from the Checker Oil Station.

COUNT SIX

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan, committed the offense of kidnapping when he unlawfully restrained Baerbel Poore against her will, with intent to advance the commission of a felony, to-wit: murder.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

/s/ Jonathan P. Westbrook
Foreman

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 81-CR-1218

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

DAVID BUCHANAN, DEFENDANT

Filed: February 25, 1982

MOTION TO PRECLUDE "DEATH QUALIFICATION" OF JURY DURING VOIR DIRE AT GUILT-INNOCENCE PHASE OF TRIAL

* * * *

Comes the defendant, David Buchanan, by counsel, and moves this Court to preclude the Commonwealth's Attorney from "death qualifying" the prospective jurors during voir dire at the guilt-innocence phase of the trial. In support of this motion, defendant states the following:

1. The defendant is charged with a capital offense and will be tried by a jury.
2. In the course of voir dire, the Commonwealth's Attorney is expected to ask prospective jurors if they are conscientiously opposed to capital punishment.
3. The Commonwealth's Attorney is expected to further question and to challenge for cause any potential juror who responds in the affirmative to said question and in addition would not vote for the death penalty under any circumstances.

4. Such use of the "death-qualification" voir dire violates the defendant's right to an impartial jury drawn from a fair cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution, in that it excludes from the jury an identifiable segment of the community opposed to the death penalty.

5. Such use of the "death-qualification" voir dire results in a jury which is biased in favor of the prosecution and therefore violates the defendant's right to a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution (See attached exhibits).

6. Because a bifurcated trial is required in cases where the death penalty may be imposed under KRS 532.025(1)(b), application of the "death qualification" voir dire to the potential jurors at the guilt-innocence phase of the trial cannot be justified by any State interest. Any legitimate interest of the state regarding punishment can be protected during the *sentencing* portion of the trial.

7. Use of "death-qualification" voir dire violates the defendant's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution since it arbitrarily singles out capital cases as cases in which the State is permitted to exclude potential jurors because of their views on punishment.

8. If this Court restricts voir dire by the defense on the issues of punishment but allows use by the state of "death-qualification" voir dire, thereby affording the state an advantage in jury selection, defendant will be deprived of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant moves this Court to preclude the "death-qualification" of the jury during voir dire at the guilt-innocence phase of the trial.

Respectfully submitted,

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JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 81-CR-1218

[Title Omitted in Printing]

Filed: February 25, 1982

MOTION FOR SEPARATE JURIES FOR GUILT-INNOCENCE AND SENTENCING PHASES WITH PROVISO THAT IN THE SELECTION OF GUILT-INNOCENCE PHASE JURY NO REMOVAL FOR CAUSE BE ALLOWED OF JURORS WHO ARE NOT "DEATH QUALIFIED" UNDER *WITHERSPOON v. ILLINOIS*

Comes the defendant, David Buchanan, by counsel, and moves this Court to order that one jury be selected and utilized to decide the issue of guilt in the above-captioned action and, if necessary, another jury selected and utilized to fix punishment in the capital sentencing portion of the trial, with the proviso that this Court during the selection of the guilt phase jury preclude the removal for cause of potential jurors who are irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. The reasons for this motion are delineated below.

1. In the event that this Court overrules the defendant's motion to preclude removal for cause of jurors who are not "death qualified" under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), this Court should on the basis of the scientific studies attached to that motion authorize the use of separate juries for the guilt-innocence and sentencing phase with the requirement that during the selection of the guilt-innocence

phase jury no challenges for cause be allowed on the ground that the juror is not "death qualified" under *Witherspoon*.

2. The scientific studies attached to the previous motion conclusively demonstrate that jurors who are in favor of capital punishment are "authoritarian types," and are more likely both to convict and to give greater sentences. Thus, the exclusion from the jury of an identifiable segment of the community who are opposed to the death penalty violates the defendant's right to an impartial jury from a cross section of the community. Such a procedure deprives the defendant of his rights to due process of law and to a fair and impartial jury under the Sixth and Fourteenth Amendments of the federal constitution, and Section 11 of the Kentucky Constitution.

3. In *Witherspoon v. Illinois, supra*, the United States Supreme Court recognized that even if the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, "a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*." *Id.*, 88 S.Ct. at 1776 N. 18. "If he [the defendant] were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a birfurcated trial, *using one jury to decide guilt and another to fix punishment*." *Id.*, 88 S.Ct. at 1776 N. 18. (Emphasis added).

4. Kentucky requires by statute that the death penalty may only be imposed in a bifurcated proceeding. KRS 532.025. Consequently, since the state legislature has already instituted a bifurcated trial procedure in death penalty cases, there is virtually no justification for allowing a single "death qualified" jury to both determine the

issue of guilt and fix the punishment in view of the potential for prejudice to the defendant.

5. The feasibility of this motion is demonstrated by the procedure delineated in the persistent felony offender sentencing statute. Under KRS 532.080(1), persistent felony offender sentencing must be conducted at a bifurcated proceeding. However, the sentencing portion of the proceeding "shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense *unless the court for good cause discharges that jury and impanels a new jury for that purpose* (emphasis added).

Surely, if a different jury may be empaneled for the sentencing phase of a persistent felony offender trial, then a second jury may be empaneled for good cause under Kentucky's death penalty statute.

WHEREFORE, this Court should grant this motion and order that one jury be selected and utilized to decide the issue of guilt-innocence in the above-captioned action and, if necessary, another jury selected and utilized to fix punishment in the capital sentencing portion of the trial with the proviso that this Court during the selection of the "guilt-innocence" phase jury preclude the removal for cause of potential jurors who are "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the fact and circumstances that might emerge in the course of the proceedings.

Respectfully submitted,

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JEFFERSON CIRCUIT COURT
NINTH DIVISION
No. 81CR1218

[Title Omitted in Printing]

Filed: March 2, 1982

RESPONSE TO MOTION TO PRECLUDE "DEATH QUALIFICATIONS" OF JURY DURING VOIR DIRE AT GUILT/INNOCENCE PHASE OF TRIAL

Comes the Commonwealth of Kentucky, by counsel, Ernest A. Jasmin, Assistant Commonwealth's Attorney for the 30th Judicial District of Kentucky, and for its answer to the Motion to Preclude "Death Qualifications" of Jury During Voir Dire at Guilt/Innocence Phase of Trial states as follows:

That defendant's motion is contrary to current law in this Commonwealth which indicates that a juror who will not follow the law can legitimately be struck. Further, that the motion is contrary to the law currently governing capital cases as laid out in *Witherspoon v. Illinois*, 391 U.S. 510.

Wherefore, the Commonwealth moves this Honorable Court to overrule the motion of defense counsel to preclude death qualification of jury during voir dire at guilt/innocence phase of trial.

Respectfully submitted,

DAVID L. ARMSTRONG
Commonwealth's Attorney

By /s/ Ernest A. Jasmin
ERNEST A. JASMIN
Assistant Commonwealth's Attorney

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JEFFERSON CIRCUIT COURT
NINTH DIVISION

EXCERPTS FROM TRANSCRIPT OF PRE-TRIAL HEARING MARCH 9, 1982

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[10] THE COURT: Well, in accordance with Weatherspoon, I'm going to [11] permit you to ask by individual voir dire one question and one question only. And, that is whether they are philosophically or religiously an alterably opposed to the death penalty under any circumstances. That's about it. We're not going to be involved in any kind of a brainwashing procedure for either side.

MR. JASMIN: Judge, we're not going to be involved in a brainwashing situation as such. I think what we need to look at . . . when we look at Weatherspoon we look at the controling cases in Kentucky, it becomes, for the most part, if they say we're opposed to it we have a second question which the Commonwealth would be required to ask and that is, whether or not they would be opposed to it in this or any other case regardless of the facts. So, if they are opposed, the Commonwealth still has to . . .

THE COURT: I thought we both said the same thing.

MR. JASMIN: Well, you said one question and one question only, and all I'm saying, Judge, is that the requirements under Weatherspoon v. Commonwealth [12] would be the Commonwealth at least ask one more after that.

THE COURT: Well, I didn't see any difference between my question and yours, Ernie.

MR. JASMIN: Well, in my eyes we understand. We understand each other.

THE COURT: Well, I know you all want some individual voir dire on some questions, too. Whatever has

to be individual voir dire by you all, whatever I agree can be individually voir dired by you all, is going to be much less than you're requesting and will be done at the same time. I'm not just going to call people in two or three at a time for individual voir dire. So, whatever questions are asked, will be extremely limited. I'm going to ask one individual voir dire. Now, what did you want to say?

MR. HECTUS: Well, Judge, I have a question from the statement of Mr. Jasmin that the Commonwealth was going to be allowed one question and one question only. Are you overruling my motion to not Weather-[13] spoon the jury during the guilt or innocence stage or prior to the guilt-innocence stage?

THE COURT: Well, we're going to get to that later on. Everything I say is tentative.

MR. HECTUS: Okay.

THE COURT: Let me say this, I have read your motion and I'm predisposed against you on the basis of the fact that everything that you suggest is rather unique and is largely supported by general constitutional arguments rather than specific cases. I do not intend to make a positive ruling against you until you've had a chance to orally argue what you want to say. In other words, I'm not going to foreclose you from an opportunity to persuade me. I've got to tell you that I'm momentarily unpersuaded by your brief, okay?

MR. HECTUS: Yes, sir.

MR. JASMIN: Which motions are those, Judge?

MR. HECTUS: The question to preclude Weatherspoon . . .

THE COURT: There are [14] two different motions. He wants a motion to preclude Weatherspoon, you've got a lot of motions really. One of them is that you be precluded from asking the Weatherspoon question until after the guilty or not guilty phase of the trial, and how that would work mechanically, is very difficult except that Mr. Hectus seems to think it could work . . . we

could pick a new jury for the sentencing phase as exists as a remote possibility. I've never seen it occur. It exists in a remote possibility in a PFO situation, haven't you read that one?

MR. JASMIN: Judge, I have read that one.

THE COURT: It shows a lot of creativity, you ought to read it.

MR. JASMIN: It shows a lot of creativity, but I think it also shows an absence of sound case law.

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[16] MR. SHAKE: Your Honor, on behalf of Mr. Stanford I have filed a motion for individual voir dire. Is it the Court's position that we will be . . . we will have an opportunity for rehabilitation when the Commonwealth questions the jurors, the prospective jury?

THE COURT: Well, you cited Irvin versus Dowell, one of the two do and what it says in Irvin versus Dowell is that rehabilitation is somewhat ridiculous. I mean, when a guy says that he is unalterably opposed under any circumstances to giving the death penalty or if he says in the other way, that he is unalterably opposed under any circumstances to not giving the death penalty, if I were to let Mr. Jasmin then ask, well could you put aside your own personal beliefs and give the death penalty anyway, you would be the first to holler, Jim. I have a lot of problem with rehabilitative questions as pure sacristy, I really do. I think the questions ought to be asked in the first place in such a clear manner that only a person who is unalterably opposed [17] under any circumstances would be excluded.

MR. JASMIN: Judge, I think that . . .

THE COURT: I don't think rehabilitation cures anything in my mind. If a guy says that he is unalterably opposed to giving the death penalty and you then got him to say that he would put aside his own personal opinion and follow the law, I would not know what to believe about the state of that man's mind.

MR. SHAKE: Well, it's a tough question to ask any person just point blank whether they would give the death penalty.

THE COURT: That's why I think it has to be worded very categorically. You know, the kind of language like I've already used. I mean, there isn't a lot of people that are going to say that they are unalterably opposed under any circumstances to giving the death penalty. As I see Weatherspoon, that's the only kind of people that Mr. Jasmin has a right to exclude for cause. The mere fact that they don't like [18] the death penalty, that they have a lot of reservations about giving the death penalty, that they would consider, as a negative factor the factor that these people are so young, my preliminary opinion would not to let Mr. Jasmin ask those kinds of questions.

MR. JASMIN: Judge, I can assure you I have no intention of asking that type of question.

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[31] MR. HECTUS: This is not a divorce case. I understand in a divorce case that many people think their lives are coming to an end, but in this case the Commonwealth is literally trying to attempt that. I think we're entitled to some consideration because it is a capitol case.

THE COURT: Well, I understand that. I intend to be very liberal about the subject of excusing people for cause. As I told Jim, I don't put a great deal of stock on rehabilitation. I don't intend to go behind people that if somebody on the jury has said something or indicated some sort of bias, I don't intend to go behind that and ask if you can put your personal opinion out of the way and be fair about that. I've had, well, probably Jim's heard me speak about it. I have an inherent suspicion of rehabilitation. So, people will be excused for cause without being rehabilitative . . .

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[45] MR. HECTUS: Judge, I have two other selection-related motions. One being a motion for separate jurors

for the guilt-innocent phase and the motion to preclude and the sentencing phase and the second motion being to preclude death qualification prior to the guilt-innocent phase. And, Judge, I submitted a somewhat lengthy exhibit and I don't know if the Court has had the opportunity to read it or not.

THE COURT: Yeah, I read it. I wouldn't say that I studied it, but I read it.

MR. HECTUS: Well, Judge, I can't say that I studied it because I'm not a statistician, but I think the conclusions are such for a layman to at least read and digest, and I would submit that this motion is based upon Weatherspoon itself since there was some language in Weatherspoon to the effect [46] that they were not going to foreclose the question as to whether, at some point in the future, that a litigant could show that Weatherspoon would tend to bias the jury during the guilt or innocent phase. And, I think this study by Diesel definitely shows that Weatherspooning a jury, you end up with a jury first of all, that is not a fair cross-section of the community, because it eliminates, per se, that segment of the community that's opposed to the death penalty. But more important than that, a Weatherspooned jury . . . the study also shows that a Weatherspooned jury is prosecution proned. And, I think that that impinges upon the defendant's right to due process in that he's being denied a right to a fair trial by an unbiased jury and impinges upon his right to equal protection, because capitol cases have beeen singled out for a Weatherspoon jury, whereas other cases are not. And, I think that there is an easy solution to the problem, and I'd liken it to a PFO situation where, for good cause, a judge can impanel a second jury for sentencing. The jury can do that [47] and death sentencing jury as it can in PFO sentencing, and in the event that the Court does that, then there's absolutely no need to Weatherspoon the jury prior to guilt or innocence phase.

THE COURT: You're saying that after the jury has tried the case and decided the guilt or innocence phase of

the case, that they would then be, for the first time, presented the Weatherspoon question?

MR. HECTUS: Well, actually, Judge, what I was asking for was a separate jury, but yeah, that jury could be Weatherspooned in the event that somebody has scruples against the death penalty such that they couldn't sit, I guess, you'd have to impanel different jurors or a different jury panel, but in any event, I don't think that it's a problem that can't be resolved. I would submit under Weatherspoon that this study was exactly the kind of a study that was contemplated by the Court in Weatherspoon and that I am adopting to show that that qualification does not apply to the death penalty. [48] THE COURT: What do you say about it, Mr. Shake?

MR. SHAKE: Your Honor, we're opposed to a second jury. We don't want two juries. We don't want a separate penalty phase. I don't know that there would be any way, you know, you could foreclose Weatherspooning the first jury before the guilt phase. I don't think that would be possible, because if one or two or more of them were intent on it, then, in effect, we would have at least a partial second jury and we would be opposed to that.

THE COURT: I think it would be unconstitutional. I mean, I think that the law clearly contemplates, except in the unique situation of persistent felony offender, which is a status offense as opposed to a penalty, it really is a separate penalty enhancing the penalty because of status, and I don't think that the question of whether aggravating circumstances exists that would justify the death penalty. I just don't think that that is the equivalent of a persistent felony offender situa-[49] tion.

MR. HECTUS: Well, in that effect, Judge, I would ask that you not Weatherspoon the jury at all.

MR. JASMIN: Judge, the Commonwealth's position is, number one, with reference to PFO's, the reason you can do it with different jurors is because I think number

one, the statute says so. In this instance, the statute makes no provisal for setting up another jury. It says after that penalty phase the judge shall instruct the jury. The jury, in the Commonwealth's mind's eye means the jury which has heard the case.

THE COURT: Well, I think you're right, Mr. Jasmin, I think you're right.

MR. JASMIN: All right.

THE COURT: I've really got to overrule those motions. You're bringing up some unique new creative kind of principles of law, Mr. Hectu-, and I think they address themselves . . . if you want to strike new ground, I think that addresses itself to the appellate Court, not to the trial court . . .

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JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 82-CR-0406

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

DAVID BUCHANAN, DEFENDANT

Filed: July 15, 1982

MOTION TO DISMISS
CAPITAL PORTION OF INDICTMENT

Comes the defendant, David Buchanan, by counsel, and respectfully requests this Court to dismiss the capital portion of the indictment herein, and order that Count 1 (murder) be prosecuted as a Class A felony. As grounds therefore, defendant states as follows:

1. Defendant David Buchanan has been charged with murder, in violation of KRS 507.020. By its own terms, murder in this Commonwealth is a capital offense without regard to its commission either intentionally or wantonly. The Commentary to KRS 507.020 states that:

> If a felony participant other than the defendant commits an act of killing, and if a jury should determine from all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).

2. Defendant David Buchanan submits that, even though under the above circumstances, a defendant *may* be guilty of murder such defendant can constitutionally be subject to punishment only as a Class A Felony, i.e., imprisonment rather than death.

3. When the Commonwealth presented its case to the grand jury, Detective Walter Tangel testified that it was Kevin Stanford, *not* David Buchanan, who murdered the victim by shooting her with a pistol. The Commonwealth's proof then, is that David Buchanan is a "non-trigger man."

4. The Commonwealth's evidence will also show that a third person, *not* David Buchanan, supplied Kevin Stanford with the weapon used to perpetrate the murder. This weapon was supplied by a third co-defendant, Troy Johnson, who admitted his guilt to the charged offenses in Juvenile Court in return for his testimony. In addition to stating that he procured a gun at the home of his brother (without his brother's knowledge or consent), Troy Johnson also testified that there was no plan or intention to kill the victim:

Q: When did you see David on January 7?

A: In the late afternoon, in the morning.

Q: Where was he and where were you when you were together?

A: I went and picked him up.

Q: At his house?

A: Yes.

Q: And came over to where?

A: Old Third.

Q: But where did you go after you picked him up?

A: Back out to my brother's house.

Q: Okay and where is that located?

A: Out Newburg.

Q: How long were you kids together that day—that afternoon or whenever it was?

A: How long were we together?

Q: Uh-huh.

A: We were together all day.

Q: Okay, did you discuss anything with regard to the Checker Oil Station?

A: Yes.

Q: Answer the question.

A: Yes, sir.

Q: What did you discuss?

A: How easy it was

Q: How easy it was for what?

A: To rob it.

On cross-examination, Troy Johnson acknowledged that there was no plan to kill anyone:

Q: Alright, when David came to your house the day this happened isn't it true that when David asked you to get the gun that he assured you that nobody would get hurt?

A: Yes, sir.

Q: So both you and David thought that the gun wasn't going to be used, isn't that true?

A: Yes, sir.

Q: And as far as you knew and as far as David knew you were going out to rob the gas station according to your testimony?

A: Yes, that's right.

Q: So David never spoke about anything else?

A: No, sir.

Q: Especially shooting anybody?

A: Yes, sir.

5. Recently, the United States Supreme Court held that a defendant found guilty of "felony murder" (i.e., what would amount to "wanton murder" in this Commonwealth) could not be constitutionally subjected to a sentence of death. In *Enmund v. Florida*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d (July 2, 1982), the United States Supreme Court vacated Enmund's sentence of death because he was not the trigger man and did not have an intent to kill the robbery victim. The Supreme Court found that it was constitutionally impermissible under the Eighth Amendment to treat those who kill, in the same manner as those who neither kill nor intend to kill.

6. This court has the inherent authority to preclude the Commonwealth from submitting the case to the jury on the issue of capital punishment. Recently, the Supreme Court of Kentucky affirmed the action of this court in so doing. *Commonwealth of Kentucky v. William Bonnie Smith*, Ky., —— S.W.2d —— (June 15, 1982). In *Smith*, this Court found that it would be unconstitutional to sentence Smith, the "non-trigger man," to death since it would be disproportionate under the facts of that case. Recognizing that the ultimate sentencing power as to capital punishment lies with the trial court, and not the jury, the Kentucky Supreme Court stated that "[i]t therefore becomes self-evident that the court should not be required to entertain an exercise in futility and preside over a hearing of any duration when it will ultimately decide, for as significant a reason as expressed in this record, that such recommendation by a jury would have been, in the trial court's opinion, 'disproportionate.'" *Smith, supra* at p. 5.

7. Defendant David Buchanan submits that to subject him to a sentence of death for an offense for which he was neither the trigger man nor had a shared intent

to murder would be cruel and unusual punishment. Additionally, because, as to the offense of murder, David Buchanan does not stand in a significantly different position than that of Troy Johnson, who was committed to a Department of Human Resources boy's camp and since released, a sentence of death for David Buchanan would be disproportionate. Accordingly, to engage in a lengthy sentencing hearing, assuming arguendo that David Buchanan were convicted of murder, would be an exercise in futility because any sentence of death would be constitutionally impermissible.

WHEREFORE, defendant David Buchanan respectfully requests this Court to exercise its inherent authority and dismiss the capital portion of the indictment, and further, to direct the Commonwealth to proceed as to the murder count as a Class A Felony.

Respectfully submitted,

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Assigned counsel for Defendant

• • • •

NO. 82-CR-0406

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

DAVID BUCHANAN

DEFENDANT

* * * * *

Upon motion of the defendant, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the capital portion of the indictment herein, be, and it hereby so, dismissed. It is further ordered that Count 1 (murder) be prosecuted as a Class A Felony.

Comm. Has No Objection

Charles L. Leibson

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

DATE: _____

JEFFERSON CIRCUIT COURT
NINTH DIVISION

EXCERPTS FROM TRANSCRIPT OF TRIAL
AUGUST 2-13, 1982

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[33] THE COURT: Well that occurred to me after . . . last Monday after motion hour. I had Mr. Hectus and Mr. Buchanan. . .

MR. JASMIN: Jasmin.

THE COURT: Mr. Jasmin, you're prettier than Buchanan, anyhow. See, that's why I don't want to have that microphone on. I'm constantly prone to say something like that. Anyhow, you know, but that's besides the point. That's just a joke. At that hearing, Mr. Jasmin conceded very openly and to his credit, I mean, that he was definitely, positively taking a position, a legal position obviated the factor, and, his legal position is that as far as the Commonwealth is concerned, Stanford is the trigger man and Buchanan is not. And, there is, of course, no way that that precludes from arguing the contrary. You can argue the contrary all you want. They have the wrong guy, but that is the legal position of the Commonwealth. It's a judgmental admission, if you please, that's been taken by the Commonwealth, that's why it's not an issue in the facts of this case.

MR. JASMIN: The Commonwealth's position is that all of the evidence we have is pointed to the fact that Kevin Stanford was the trigger man.

THE COURT: So, that's where [34] I'm at and I overrule your motion. I'm glad you put it up, not that the Court has made any judgments about who should be tried death penalty or non death penalty, but as expressed by the Commonwealth; again, Stanford for the death penalty because they consider him to be the trigger man and they are going to prosecute against Buchanan for life imprisonment because they do not consider him to be the trigger man.

MR. JEWELL: Okay, our problem is, if that is the case we felt it should have been decided in the penalty phase or on a motion of the Commonwealth to ammend . . . . a motion as opposed to Buchanan. . . a motion to exclude thedeath penalty based on factual issues.

THE COURT: Well, you're overruled. Cases are changed all the time. For example, every murder case is almost always charged as a capital case. Then, the Commonwealth has to come forward with aggravating circumstances then . . . even so, that doesn't apply here, then they change the case from a capital case to a non capital case.

MR. JEWELL: We have renewed our severance motin as well. We feel we prejudiced by having to try a capital case with a non capital co-defendant.

THE COURT: Mr. Jewell, I overrule you on that, too.

[35] MR. JEWELL: We also have one motion which the Court have under submission to exclude the death penalty based on the defendant's age which has not been finally ruled on.

THE COURT: I thought I had ruled on that.

MR. JEWELL: You remember you want to wait to see if the law is repealled.

THE COURT: You're right, I told you how I was going to rule on it.

MR. JEWELL: And, now the law was merely delayed, so I filed a follow-up motion to that back in June and the Court took it under submission.

THE COURT: My position is that when the legislature moved that to 1984, that will be delayed then, too, in my opinion. So, you're overruled on that, too, the case will be tried as a capital case.

MR. HECTUS: I had, at one time, filed a motion for separate juries for the guilt or innocent portion of the trial and the penalty phase of the trial. Of course, the basis of my motion was that a death qualified jury is

prosecution prone according to studies that I appended to my motion and I would like to renew my motion because I now have a client that's not even subject to the death penalty but is going to be tried by a death qualified Jury.

[36] THE COURT: I'm going to overrule that, we've been through all of that.

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[38] THE COURT: . . . I intend to make it my ruling that I'm going to ask all of the individual voir dire questions of the Jury.

MR. JASMIN: Judge, at this point, I'm going to tender to the Court the same item I tendered to it in the Horton case, why the Court shouldn't ask all of the individual voir dire questions based upon *Gary versus Commonwealth*, it's an excerpt of page 199 of the prosecutor's hand book published by the office of the Attorney General.

THE COURT: Well, I'll tell you what I intended to ask the Jury. They are the same questions that I asked all of those times in the Horton case. Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or in any other case and regardless of what the evidence may be? . . .

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[63] (WHEREUPON, at this point the Court adjourned to the juryroom for the individual voir dire procedure and Court continued as follows:)

MR. JEWELL: Before we get started, Judge, I understand we have a continuing objection on not allowing the attorneys to ask rehabilitation on Weatherspoon questions and we'd like the record to show . . . well, we'll enter our objection to anybody being struck for cause on the Weatherspoon case, which we have stated earlier. We feel it denies us fair representation of the community. So, when that happens, I'll just say note my objection.

THE COURT: I'm sure Mr. Hectus joins in that objection.

MR. HECTUS: We will, your Honor, same given reasons.

THE COURT: You're not even involved at this point but I do want to say this much, the basic ground rules, of course, Mr. Jewell, Mr. Shake, I don't want both of you talking on any particular point. Whoever's going to do the talking, that's fine, you can change for the next witness or the next Juror whenever you like, but only one of you can talk on any particular person that's been questioned in any respect and I do think [64] we ought to agree on the order in which you will speak in order to expedite the trial; and I do think we ought to agree, again in order to expedite the trial, that whenever any defendant makes an objection on behalf of that defendant, that the other defendant should automatically have the same objection so they don't have to, we don't have to repeat, okay? In other words, the other set of attorneys don't have to speak unless he has something to add that needs to supplement what's already been said. We do want to get away from, you know, repeating the same thing over and over again.

MR. HECTUS: For example, I don't have to move to join the objection?

THE COURT: Exactly.

MR. HECTUS: So, you're going to assume I join it unless I say otherwise?

THE COURT: Of course, presuming that the objection either defendant makes is preserved automatically for the other defendant as well.

MR. JASMIN: I think that would be proper because as I see it, at this point, Buchanan is not involved in the death qualification.

THE COURT: We're going to be talking about more than just Weatherspoon, we're going to be talking about some other things, too, all we said so far follows *Carolina versus Allen*. . . .

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[EXCLUSION OF JUROR ASPATORE]

[69] MISS ASPATORE: Aspatore.

THE COURT: All right. Miss Aspatore, this is a case where the Commonwealth will be demanding the death penalty for one of the defendant's in the case. Now, I'm not asking you in anyway to tell me what your judgment would be in that respect, you understand? You haven't heard any of the evidence on the subject yet. But, I am asking you a questions which is related to whether you could consider it as a possible penalty. That's all my question is; 'do you have any conscientious scruples against imposing the death penalty such that you couldn't consider it, under the circumstances, in this or any other case and regardless of what the evidence may be?

MISS ASPATORE: I would hate to.

THE COURT: That doesn't disqualify you. People naturally would be reluctant to impose the death penalty. That's not the question though, not whether you would be reluctant but whether, because of some religious or conscientious scruples, you know, that it would be just impossible for you to do it regardless of what the evidence might be?

MISS ASPATORE: I don't think I could.

THE COURT: Okay, no matter how bad the evidence was?

[70] MISS ASPATORE: Well, I haven't never been on a Jury before.

THE COURT: Yeah?

MISS ASPATORE: So, I haven't been exposed to this.

THE COURT: But, the only thing, you take your time, I'm not trying to get you to say anything one way or the other. I want you to take your time and think about it. The only way that I would excuse you would be if you told me there would be no possible way that you could give the death penalty in any case regardless of

what the evidence might be and if that's the truth, then of course, you would be disqualified because you would be asked to consider something which you could not do.

MISS ASPATORE: I really think it would be impossible. I just don't think I could give anybody the death penalty.

THE COURT: All right, then I'm going to excuse you as a Juror. You're excused and you're free to leave.

MISS ASPATORE: Thank you.

MR. JEWELL: Note my objection.

THE COURT: You've got that objection automatically for any Juror I excuse for this particular question. . .

* * * *

[85] . . . . and I want to tell you I'm not asking how you would decide this case, you haven't heard any evidence, yet and you should have no opinion about that, about this case. But, what I want to ask you is this: 'do you have any conscientious scruples against imposing the death penalty such that you could not consider it, under the circumstances in this case or in any other case and regardless of what the evidence might be?

MR. CAIN: Would you repeat that for me?

THE COURT: Okay, I want you to think about it and I'm glad to repeat it. Do you have any conscientious scruples, that means standing convictions as a matter of conscious, against imposing the death penalty such that you could not consider it, under the circumstances in this or in any other case and regardless of what the evidence might be?

MR. CAIN: I don't know, you mean, what I think about the dealth penalty, you know, whether somebody is guilty, I could decide when they got the death penalty or not?

THE COURT: Exactly. I'm not asking which way you would decide or would your mind be made up one way or the other?

MR. CAIN: I don't know if I could decide that or not, you know. I don't really believe in the dealth penalty, you know, it would be hard * * *

[EXCLUSION OF JUROR CAIN]

[86] THE COURT: The question goes . . . I don't know that you were listening and I repeated the question because you asked me to repeat it. The question is not whether you would have a hard time in reaching that decision, the question is if you could reach the decision to impose the death penalty if the evidence in the case warranted it.

MR. CAIN: I don't think . . . could I ask you a question?

THE COURT: Yeah.

MR. CAIN: Is that what this case is about?

THE COURT: Yeah.

MR. CAIN: I don't think I could decide that.

THE COURT: Do you think it would be improper, regardless of how serious the evidence might be, impossible for you to decide on the death penalty in this case?

MR. CAIN: Yes, sir.

THE COURT: Okay. Well, then that would disqualify you. So then, I'll release you as a Juror. This is your last day, just go back to the jurypool, okay?

MR. CAIN: I'm sorry.

THE COURT: Okay, I appreciate [87] it. We expect you to answer the questions honestly.

MR. JEWELL: Note my objection.

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[EXCLUSION OF JUROR EHMAN]

[110] THE COURT: Come right in and have a seat. Are you David Ehman?

MR. EHMAN: Yes.

THE COURT: Am I pronouncing that correctly?

MR. EHMAN: Yes, Ehman.

THE COURT: Mr. Ehman, I just want you to relax.

MR. EHMAN: Okay.

THE COURT: My first question is: 'do you have any personal committment during the next two weeks that would make it very difficulat, as a practical matter, for you to serve on this Jury?

MR. EHMAN: No, sir.

THE COURT: All right. Now, my next question has to do with the death penalty. I'm not asking you in any way how you would decide this case, you haven't heard any evidence, yet, so that's not involved. But, the death penalty is one of the things that you are going to be asked to consider and my question is: 'do you have any conscientious scruples against imposing [111] the death penalty such that you could not consider it, under the circumstances, in this or in any other case and regardless of what the evidence may be?

MR. EHMAN: I don't think I could.

THE COURT: Well, I want to be clear about this now, because, the question is not whether you'd be reluctant or not.

MR. EHMAN: Yeah.

THE COURT: It's perfectly proper for you to serve regardless of whether you would be reluctant or not. The question is: 'would it be impossible for you to consider it anyway, no matter what the evidence might be?

MR. EHMAN: I don't know. I just couldn't see making that kind of decisior. It's kind of hard for me to do.

THE COURT: Again, Mr. Ehman, the fact that it would be hard for you to do wouldn't disqualify you. The only think that would disqualify you is if you tell me it would be impossible for you to do, under the circumstances.

MR. EHMAN: Yes, I think it would be.

THE COURT: Okay, then I'm going to excuse you.

MR. JEWELL: Just note my objection.

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[EXCLUSION OF JUROR ENGLERT]

[113] THE COURT: Now, my next question has to do with the possibility of considering the death penalty in this case.

MISS ENGLERT: Uh-huh.

THE COURT: And, I'm not asking you how you would decide this case, you have heard none of the evidence, yet, and I'm not suggesting anything by my questions, okay?

MISS ENGLERT: Uh-huh.

THE COURT: Do you have any conscientious scruples against imposing the death penalty such that you could not consider it, under the circumstances, in this or in any other case and regardless of what the evidence might be?

MISS ENGLERT: Uh-huh, I think I would have a hard time. I don't think anybody has a right to take somebody's life. I wouldn't vote for the death penalty, I know that.

THE COURT: Well, I want to be very clear about this. If you're telling me, not that you'd have a hard time because that doesn't disqualify you at all. I think you should be reluctant about the death penalty, that certainly is no reason for you not to [114] serve on a Jury. The only thing that would disqualify you is if you tell me that it would be impossible under any circumstances, no matter what the evidence might be, it would be just impossible for you, because of your opinion either religious, philosophical or whatever, impossible in any case to render the death penalty.

MISS ENGLERT: Yes, I think it would be.

THE COURT: Okay. I appreciate you being honest and I will excuse you.

MISS ENGLERT: Okay, thank you.

MR. HECTUS: Note my objection to that last Juror being excused.

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[EXCLUSION OF JUROR ROUNDTREE]

[181] THE COURT: My question is this: do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, in this case or in any other case, and regardless of what the evidence may be?

MISS ROUNDTREE: No, I don't. I would not be able to sentence anybody as far as the death penalty.

THE COURT: Well, okay, now let me pursue this with you a little bit further because I'm sure nobody every asked you that question before.

MISS ROUNDTREE: No, they haven't.

THE COURT: This question has to do with whether you have any religious beliefs, or philosophical convictions or fixed opinions about the subject that would make it impossible for you to consider imposition of the death penalty, not just a question of whether you would be reluctant or whether it would be hard to do to accept that responsibility. It's not a question of whether, you know, it might be personally difficult for you to be involved in a situation. The only question is whether you have religious convictions, or fixed opinions against imposition of the death penalty that you bring with you so that you couldn't possibly consider it.

[182] MISS ROUNDTREE: As far as my religious convictions are concerned, I don't feel that any human being has any right to, you know, to have anything to do with anybody else's life as far as you sentencing them you know, to the death penalty or anything like that.

THE COURT: So you're saying, no matter how bad the evidence was, it would just be impossible for you to do that?

MISS ROUNDTREE: Yes, sir.

THE COURT: All right, I'm going to excuse you as a Juror in this case.

MISS ROUNDTREE: Okay, thank you.

MR. JEWELL: Note our objection.

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[EXCLUSION OF JUROR SEBREY]

[192] THE COURT: Okay. Now, my next question to you has to do with the possible penalties in this case. I do not, by my question, in anyway mean to suggest anything at all about how the case should be decided. We have not heard any evidence, yet.

MISS SEBREY: Right.

THE COURT: But, my question has to do with possible penalties and it is: 'do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, in this case or in any other case, and regardless of what the evidence may be?

MISS SEBREY: I don't believe I could take a life.

THE COURT: Well, let me finish my question.

MISS SEBREY: Oh, okay, I'm sorry.

THE COURT: I want you to listen to all of it, okay?

MISS SEBREY: Okay.

[193] THE COURT: Do you have any conscientious scruples, such that you could not consider it, under the circumstances, in this case or in any other case and regardless of the evidence may be? No matter how bad the evidence may be? I'm asking you a lot more than just whether you'd be reluctant and a lot more than whether it would be difficult for you. I'm asking you whether you have religious or ethical convictions or fixed opinions such that you could not consider it at all?

MISS SEBREY: I still don't believe I should take a life.

THE COURT: What is your answer? That you could not?

MISS SEBREY: No. I couldn't have somebody killed because he killed somebody else.

THE COURT: I don't know that that . . .

MISS SEBREY: Is that what you asked me

THE COURT: Okay, then, since that is something that the Jury will have to consider in this case, we're going to have to excuse you as a Juror. Thank you very

much for coming and answering our questions for us and we appreciate your time.

MISS SEBREY: Okay, thank you.

MR. JEWELL: Note our objection.

THE COURT: All right, we have it in the record.

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[EXCLUSION OF JUROR FRYE]

[247] THE COURT: All right, fine. Now, my next question has to do with the subject of possible penalties that you might have to consider. I want to tell you that I'm not, by my question, suggestion anything at all about how the case should come out. We haven't heard any evidence, yet, do you understand?

MR. FRYE: Yes, sir.

THE COURT: Do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, under any circumstances, in this or any other case and regardless of what the [248] evidence may be?

MR. FRYE: Yes, sir.

THE COURT: Okay, tell me a little bit about that.

MR. FRYE: I just don't think I could do that.

THE COURT: What do you mean by that, what's on your mind?

MR. FRYE: I just don't believe in the death penalty.

THE COURT: Okay. Now, are you saying that you don't believe in it? We're not talking about whether it would be difficult or very serious. We're talking about a religious conviction or personal conviction that you know it would not matter what the proof was in the case, there's no possibility that you would decide for the death penalty. That you couldn't consider it, is that what you're telling me?

MR. FRYE: Yes. Well, I mean, I was taught and brought up in the church and everything, I mean, it's wrong for one man to take another man's life, it's my theory.

THE COURT: Even if the law provides for that?

MR. FRYE: That's right.

THE COURT: Okay, then, I'm going [249] to excuse you, Mr. Frye, and you can return to the jurypool. Nice to meet you. Thank you.

MR. FRYE: Thank you, sir.

MR. JEWELL: Note our objection.

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[DEFENSE TESTIMONY BY MARTHA ELAM]

[1114] (WHEREUPON, Court was adjourned at approximately 11:40 a.m. and continued as follows at approximately 1:05 p.m.)

THE COURT: All right. Court will come to order. We're now ready to proceed with the defendant's case. I guess Mr. Jewell and Mr. Shake?

MR. JEWELL: We'll rest at this time, your Honor.

THE COURT: All right. Then, Mr. Hectus, may I inquire to you regarding the defendant, Buchanan?

MR. HECTUS: The defendant, David Buchanan, would call Miss Martha Elam.

(WHEREUPON, Miss Martha Elam was sworn to tell the truth, the whole truth and nothing but the truth and testifies as follows:)

DIRECT EXAMINATION:

QUESTIONS BY MR. HECTUS:

3372 Q Miss Elam, as I ask you a question would you please respond and tell the Jury your answer to any particular question. Now, would you state your name for the record, please?

A Martha Elam.

3373 Q Where are you employed?

A Department of Human Resources.

3374 Q What is your position with the Department of Human Resources?

[1115] A I'm a social worker.

3375 Q And, what duties does that entail?

A I work with juvenile delinquents and status offenders that have been committed to the Department through the Juvenile Court until they're 18.

3376 Q All right. Now. . .

THE COURT: Could I ask you to use that microphone? I can't hear you, maybe the Jurors can but I can't. If you hold it about three inches from your mouth. Okay, fine. You said you work with juvenile delinquents and what?

THE WITNESS: And the status offenders that are committed to the Department until the age of 18.

3377 Q What is a status offender?

A Truant or beyond parental control.

3378 Q Now, incident with your job with the Department of Human Resources as a social worker, have you come in contact with David Buchanan?

A Yes.

3379 Q And, what is the nature of your relationship with David?

A I was his community social worker.

3380 Q And, in fact, you still have him open on your case load, is that correct?

A Yes.

[1116] 3381 Q Now, can you tell me or tell the Jury when David was first committed to the Department?

A He was committed to the Department on May the 1st, 1980.

3382. Q And that was for the purpose of residential or institutional placement, was it not, as opposed to home supervision?

A Yes.

3383 Q And, where was David placed?

A He was placed at Danville Youth Development Center.

3384 Q And, do your records show on what date he was placed in Danville?

A May the 12, 1980.

3385 Q On June 3rd, 1980, do your records show that he was evaluated by Carol Schultz and Dr. Michael Neetzel?

A Yes.

3386 Q Miss Elam, I'm going to show you what's been marked as David Buchanan Number 1 and ask you if this is not a true and accurate copy of a report that's contained in your records?

A Yes, it is.

3387 Q Both pages?

A Yes.

3388 Q Now, are you the official custodian of those records?

[1117] A Yes.

MR. JASMIN: Counsel, may I see what you're referring to?

MR. HECTUS: Referring to the copy of the report of Dr. Neetzle.

3389 Q You are the official custodian of these records?

A Yes.

3390 Q Now, is it common for a child, once placed at a DHR treatment facility to be evaluated once he's there?

A Most of the time, yes.

3391 Q And, what would be the purpose of that evaluation?

A Generally to see if the placement, where the child is, is an adequate placement.

3392 Q Now, would you read for the Jury that psychological evaluation that was done on June 3rd, 1980?

A (Witness reading the report) David Buchanan is a 16 year old black male referred for a psychological evaluation by Steve Yonik, Director of the Lakefront Program. The purpose of the evaluation was to aid in determining appropriate placement for David. David was very quiet during the examination and conveyed some-

what of a suspicious attitude. For example, he was slow to respond to questions and test stimuli and frequently demanded that the examiner repeat questions or instructions the second time. When he did respond to test stimuli, he [1118] did not appear to take time to think about his answers. At times, he repeated questions. When performing the picture completion test, David asked what's missing in this before each card. Throughout the session he appeared distant and his affect was flat. He did not smile at any time nor was there much variation in verbal expressions. David's home is in Louisville where he lives with his mother and two younger sisters. According to David, he has no difficulties at home. Although he was arrested on a charge of first degree burglary, he denies having been involved in the incident or in previous incidents for which he was arrested. He resents being placed at the Danville Youth Development Center as he says he did not commit the crime and does not need any help. The Unit Director reports that the family supports the view of David's innocence and is generally hostile toward authoritative figures. Test results: David obtained a full scale I.Q. of 74. Verbal I.Q. of 76 and a performance I.Q. of 75, respectively. These scores fall in the borderline range of intellectual functioning. Among the verbal sub-tests, David is markedly deficient in verbal comprehension. He is moderately to mildly deficient in the other verbal areas. On a performance sub-test, he displayed greater verital ability. He is markedly deficient in awareness of logical sequences and analysis synthesis of non-meaningful material and moderately deficient in ability to distinguish essential [1119] from non-essential details. However, David displayed average ability and rapid visual motor shifting analysis and synthesis of meaningful material. David's response to projected testing suggests an individual with isolated mistrust of others and inner personally deficient. His reproduction of the Bendrick designs are indicative of emotional disturbance. Along with his test behavior and flat affect, his

pattern of tests responses suggest a mild thought disorder. He is likely to deal with his thought disturbance in a socialapathic manner. Although he tends to withdraw from others, when pushed, he becomes hostile. Reccommendations: David emotional disturbance and his resentment of his placement at the Danville Youth Development Center appear to militate against his success in this program. This view is reinforced by the negative attitude of the family toward David's placement here.

3393 Q In effect then, would you agree that Carol Schultz and Dr. Neetzel were saying that Danville was an inappropriate placement?

A Yes.

3394 Q What did the Department do then as a result of that particular psychological?

A He was transferred to Northern Kentucky Center for a 30 day evaluation.

3395 Q And, can you tell the Jury on what date that was?

[1120] A July the 10th, 1980.

3396 Q Approximately four to five weeks after this evaluation?

A Yes.

3397 Q Okay. Was he then evaluated again while he was at Northern Kentucky Treatment Center?

A Yes.

3398 Q And, Northern Kentucky Treatment Center is what sort of an institution?

A It's a treatment facility for emotionally disturbed youths.

3399 Q Now, I hand you a psychological evaluation that is signed by Dr. Robert Nolker and ask you if that's a true and accurate copy of a report kept in your records?

A Yes.

MR. HECTUS: Mr. Jasmin, I'm using Dr. Nolker's psychological.

MR. JASMIN: Thank you.

MR. HECTUS: Judge, at this time, I move Defendant's A into evidence which is the Neetzle psychological.

THE COURT: May I take a look at it please?

MR. JASMIN: Your Honor, approach the bench please?

THE COURT: Come up, gentlemen.

[1121] (WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. JASMIN: Your Honor, if he's going to put that into evidence, I would like to have a copy of it.

THE COURT: You don't have any objection other than that?

MR. JASMIN: Judge, I have an objection to the whole situation. I want to put in an objection, a continuing objection to the whole thing.

THE COURT: You know and I know that I'm not ruling that the records can be put in just simply that they can be read into the record. I'm not ruling that the records can be introduced anymore than the police records or reports. This is nothing but simply a statement from a doctor.

MR. HECTUS: Uh-huh.

THE COURT: There is no basis then if the witness testified in person and then somebody tried to offer his statement about what he had testified to. I don't know any basis for introduction of the written evidence as an exhibit to go back to the jury room.

MR. HECTUS: Because it's a copy of a record upon which she relied on when she made her placements or recommendations.

THE COURT: But, I'm telling you, at least at this time, I'll listen to you and I'll certainly permit

it to be marked and filed with the record but as . . . I don't know what the rule relevant to the admission of records is.

[1122]

MR. HECTUS: I don't think it's any different than the chain of custody that Mr. Jasmin had people testify to.

THE COURT: The difference is that nobody objected, that's the difference.

MR. HECTUS: Judge, I had a continuing objection to all of that until the chain was completed.

THE COURT: You objected to it . . . well, I made my ruling, anyhow, my ruling that as far as these records coming in as such, that I'll reserve a ruling until after the Jury is gone but I'm not going to let you admit it at this point.

MR. HECTUS: Thank you, your Honor.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and Court continues as follows:)

QUESTIONS CONTINUED BY MR HECTUS:

3400 Q Now, Miss Elam, would you read for the Jury the psychological evaluation dated August 21st, 1980?

A (Witness reading report) David Buchanan was seen at the request of Jim Mosley, Superintendent of Northern Kentucky Treatment Center. Apparently, David was recently transferred to the Northern Kentucky Treatment Center from the Lakefront Program at Danville. He was not adjusting to that program in terms of the Danville Center in terms of adapting to basis rules, regulations and structure. In addition, his uncle an inmate at Eddyville Penitentiary has apparently filed several legal motions in his behalf. In any event, David is

now at [1123] the Northern Kentucky Treatment Center and is being assessed relative to his current levels of emotional and/or personality function. Since his social and legal history has been detailed elsewhere, it will not be made an intrical part of this report. However, it should be mentioned in passing that he comes from a fairly typical poor urban home in Jefferson County and that he has been in Court on multiple occasions for offenses ranging from theft over $100 to robbery. A recent psychological evaluation found him to be an isolated, mistrustful and depressed individual with a mild thought disorder. Sciopathic or psychopathic characteristics were also noted. Current observations and test results: Since a recent psychological dated June of 1980 was completed, a readministration of an intelligence test was not attempted at this time. Rather, this examiner focused on overall personality function. The Housetree, Person, VanderGestalt and a diagnostic clinical interview were presented and completed at this time. David Buchanan presents as a quiet, rather withdrawn and at least moderately depressed 16 year old black youth. He is oriented for time and place and person. His thinking, however, is extremely simplistic and very concrete. Impulse controls under, even minimal stress, are felt to be very poor. He is not seen as sophisticated but rather as a very dependent, immature, probably pretty severely emotionally disturbed and very easily confused youth. [1124] Short term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Inneractions with peers is likely to be extremely superficial and very guarded. David uses the psychological defense and projection, denial of rationalization and isolation extensively. He will be easily lead by other more sophisticated delinquents or youths. He has very little inner personal skills and is likely to be seen by other youth as a pawn to be used. David's human figure drawings are extremely bazaar. Combined with his flat affect and depressed mood, as well as, other suggestions of cognity (inaudible) order, it is felt that this individual has potential for developing a full-blown schizophrenic disorder. At the present time, at least, he is extremely mistrustful, suspicious and even paranoid. He is in need of on going extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point view, residential environment. In view of the presence of extreme unmet dependency need, early sustained frustration and minimal success in almost any endeavor, there exists the strong probability that underlying considerable passitivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against other persons. While this [1125] has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition. Diagnosis: Under socialized, digressive disorder conduct . . . conduct disorder and personality disorder, paranoid personality. The possibility exists for regression and psychological function to a full-blown psychotic or schizophrenic state in the future.

3401 Q And, that's signed by Dr. Robert Nolker, Ph.D?

A Yes.

3402 Q Licensed clinical psychologist?

A Yes, uh-huh.

3403 Q And the date of that was August 21st, 1980?

A Yes.

3404 Q Can you tell me what the Department's next involvement was with David?

A Well, at that time, he was admitted for treatment and was to remain there for treatment.

3405 Q And, what date was that that he actually was admitted.

A July the 10th, 1980.

3406 Q Well, that was the date, was it not, that he was actually referred there for evaluation?

A Yes.

3407 Wasn't he admitted for treatment subsequent . . .
A To August the 21st.
3408 Q Pardon me?
[1126] A After August the 21st.
3409 Q What date would that have been?
A August 21st.
3410 Q Do you records actually show what date he was admitted for treatment?
A No.
3411 Q Okay.
MR. HECTUS: I'd like this to be marked as Exhibit C.
3412 Q Miss Elam, I'm showing you a report dated September 26, 1980, titled an interium progress report and ask you whether or not this is a true and accurate copy of a report contained in your records?
A Yes.
3413 Q Okay.
A Yes, yes, it is.
3414 Q So, sometime after August 21st, and before September 26th, David was admitted for treatment at Northern Kentucky Treatment Center?
A Yes.
3415 Q Would you please read to the Jury the document titled interium progress report and dated September 26th, 1980?
A (Witness reading from report:) There have been no major changes in David's overall treatment program. Personal, inner personal adjustments: David continues [1127] to be extremely resistant to all treatment methods utilized thus far. All attempts to motivate David toward self improvement have been unsuccessful. David continues to project a self-deficient image. David has repeatedly denied having any difficulty that he would like to obtain a better understanding of or ability to be able to cope with. David flatly refuses any responsibility for his past or present inappropriate behavior. Some of the above mentioned attitude is currently being reinforced

by David's uncle, an inmate at the Eddyville Penitentiary, who is filing legal motions to obtain David's release. During individual counseling sessions, David has expressed a great deal of confidence in his uncle's efforts. Also, during these sessions, it is quite apparent that David is afriad to divulge any information about himself or his family life that might indicate that there are some flaws in his personality and/or his family structure. Due to David's lack of motivation, all extra curricular activities and privileges are being withheld in an effort to encourage genuine participation in therapeutic activities. David has already begun to show some signs of unrest and interest in reacquiring the afore mentioned privileges. School personnel report that David is reading on approximately the fourth grade level and almost able to perform fifth grade math. They also report that his attitude in the classroom has been fair but that he is reluctant to work [1128] with others. Enclosed is a copy of David's most recent report card. Placement planning: At this time, a projected placement date cannot be given. If there are any questions, feel free to contact us. And, it's signed by Jim Mosley, Superintendent.
3416 Q It's also signed by Nelson . . .
A Nelson Hanson, yes.
3417 Q Now, the front of that report indicates that David birth date is May 19th, 1964, is that correct?
A Yes.
3418 Q So, at the time of this report, he was 16 years old in September of 1980?
A Yes.
3419 Q Miss Elam, I'd next like you to refer in your records to a letter.
MR. HECTUS: I'd like this marked as Exhibit D.
3420 Q A letter to Judge Snyder and signed by Nelson Henson and ask you if that's not a true and accurate copy of a report contained in your record?
A Yes.
3421 Q Now, what is the date on that letter?
A October the 10th, 1980.

3422 Q So, that would be some two weeks after the interium progress report that stated that David continued to be extremely resistive to all treatment methods?
[1129] A Yes.
3423 Q Will you read the letter to Judge Snyder to the Jury?

A (Witness reading letter:) Dear Judge Snyder, David Buchanan was admitted to the Northern Kentucky Treatment Center on July 10th, 1980 for the offense of robbery in the first degree. While David has been residing at the center, we have attempted to provide individual counseling which will enable him to function more positively in the community. Although we cannot predict future behavior, we certainly feel that David is better able to cope with personal problems. David will be returning to the community sometime within the next two weeks. He will, of course, remain under the supervision of the Department of Human Resources and his Community Service Worker will be Martha Elam, 400 Legal Building, Louisville, Kentucky. While on supervised placement, David will be expected to adhere to the following regulations and guidelines. 1: He will be expected to meet with his Community Service Worker, Martha Elam, on a regular basis. 2: He will be expected to follow any regulations which are established by his mother and Miss Elam. 3: He will be expected to obey all Federal, State and local laws. Thank you for your cooperation in this matter, if you have any questions, don't hesitate to contact us. And, that's signed by Nelson Hensley, Unit Director.

[1130] 3424 Q Now, Miss Elam, it was Judge Snyder, was it not that committed David in March or May of 1980, was it not?

A Yes.

3425 Q Now, do you know why that Department writes a letter to a Judge informing the Judge why a particular child is going to be released?

A No, I don't.

3436 Q Are you familiar that a Juvenile Judge can reject the release of a child?

A Yes.

3437 Q And, would not, a letter from the Dep.rtment of Human Resources reflecting that child's treatment by the Department enable a Judge to exercise his discretion on whether or not to object or not?

A Yes.

3438 Q Did you have any input into David's release from the Northern Kentucky Treatment Center?

A No, I did not.

3439 Q Reflecting on his psychologicals and his interium progress report, would it be your opinion that this letter was an accurate appraisal of David's progress?

A Based upon the reports I have in the record, no.

3440 Q All right. When was David released from Northern Kentucky after this letter was written?
[1131] A David was released October the 13th, 1980.
3441 Q Some three days after this letter was written?

A Yes.

3442 Q What happened then, where did he go?

A He was placed home with his mother.

3443 Q And, that placement was controlled, not by yourself, but by the Department, was it not?

A Yes.

3444 Q And, what responsibilities did you have once David was back home?

A To see that he got in school; to keep a regular contact with him and his family; to help him with any . . . if there's was any problems that existed.

3445 Q Where was David, in fact, enrolled in school?

A Initially, he went to Pleasure Ridge Park School.

3446 Q And, that was in the regular academic program, was it not?

A Yes.

3447 Q And, what happened subsequent to that with regard to David's education?

A And educational meeting was held and David was subsequently placed at Butler High School in an EMH class.

3448 Q And, what is the EMH?

A Educatable mentally handicapped.

3449 Q And, who initiated that particular meeting, [1132] the Department or the Board of Education?

A I contacted the Department to see that when he did return home that he was properly placed; and, they in turn, gave him a series of tests and replaced him in Butler.

3450 Q So, it's your testimony that the Department had him replaced rather than the Board of Education?

A Yes.

3451 Q Now, what happened next after David was placed at Butler?

A No reply.

3452 Q How long did he stay at Butler?

A Um . . . he stayed at Butler . . . he attended Butler sporadically. His attendance, as of December was, he had missed, I think approximately six days of school until the school called me on December 4th, and said that he was not attending school.

3453 Q And, what day did he enroll in Butler?

A November the 10th.

3454 Q And so, between November the 10th and December 4th, he missed six days of school?

A Yes.

3455 Q Out of approximately four weeks, three and a half weeks?

A Yes.

3456 Q All right. And, what was his progress after [1133] December the 4th?

A A I have no school reports. School was unable to find him, he was not going to school.

3457 Q He was not going to school?

A That's what the teacher told me.

3458 Q Okay. And, when did you find out that information?

A On December the 4th.

3459 Q What was David's school record between 12-4 and January the 16th?

A I don't have that record.

3460 Q Can I refer you to your records . . . do you have a report dated August the 11th, 1981, transfer hearing report and authored by yourself

A Where is that from?

3461 Q Transfer hearing report dated August 11th, 1981.

A No, I can't find it.

3462 Q All right.

A Oh, you mean my report?

3463 Q Yes?

A Yes, yes.

3464 Q Can I refer you to page 2, bottom paragraph which is labeled Section 3, School History?

A Yes.

3465 Q Now, would you read that and see if it refreshes your memory as to David's school attendance?

[1134] A The last sentence?

3466 Q Yes?

A At the beginning. Upon David's release from the Northern Kentucky Treatment Center on October 13th, 1980, he was placed with his mother, Colleen Brookins. David enrolled at Pleasure Ridge Park School in the 10th grade on October the 22nd, 1980. However, an educational meeting was held with Mrs. Brookins, David and Linda Wilheim at Butler High School on November 10th, 1980 and it was determined that David needed to be in EMH classes. David enrolled on November the 10th, 1980 at Butler High School, that same day. David also attended Mill Creek Vocational School where he was enrolled in commercial foods. David's attendance as of 12-4-80 was sporadic as he had a total of six absences.

From 12-4-80 until 1-16-81, David's school attendance was reportedly irregular.

3467 Q Now, you stated that it was the Department that made the decision to enroll David at Pleasure Ridge Park High School in the regular 10th grade program, right?

A Yes, it was mutual.

3468 Q Did it strike you as mutual that a child that had been reported to have an I.Q. of 74, extremely emotionally disturbed, fourth grade reading level and almost a fifth grade math level should be enrolled in the 10th grade?

A Well, yes.

[1135] 3469 Q Or, was that in accord with routine Department practice?

A I was not present at that meeting, so I don't know.

3470 Q I'm asking you if you have an opinion on the Department's practice?

A No.

3471 Q And, your notes I assume would stop on 1-16-81?

A Yes.

3472 Q That's the date that David was arrested?

A Yes.

3473 Q And, in fact, David's commitment to the Department had never been recinded, had it?

A No.

3474 Q Now, during the time that David was home the Department would refer to that placement as a 'home supervised placement', would it not?

A Yes.

3475 Q And, the Department, in its conditions of placement, sets certain rules and regulations and obligations that the child is supposed to meet, does it not?

A Yes.

3476 Q And, one of them would be regular school attendance?

A Yes.

[1136] 3477 Q And, should the Department elect to revoke that 'home supervised placement' and reinstitutionalize the child, there are procedures available, are there not?

A Yes.

3478 Q And, that would be administrative procedures?

A Yes.

3479 Q You would not have to go back to Court?

A That's right.

3480 Q Can you tell the Jury any administrative procedures were implemented in order to revoke David's 'home supervised placement'?

A No.

MR. HECTUS: Thank you, I have no further questions.

THE COURT: Mr. Jasmin, do you intend to ask any questions of this witness?

MR. JASMIN: Yes, Judge.

CROSS EXAMINATION:

QUESTIONS BY MR. JASMIN:

3481 Q Miss Elam, do you happen to know what that uncle's name is that you've been referring to in your records?

A No, I don't.

3482 Q When a kid is placed in the home aren't there certain responsibilities that the mother is supposed to have?

[1137] A Yes.

3483 Q Would one of those be to insure that he got up to go to school every morning?

A Yes.

3484 Q How many people do you have on your case load, ma'am?

A Approximately 25 to 30.

3485 Q Okay. Roughly, how many of those have a condition with reference to going to school?

A All of them that are at home.

3486 Q All right. There was no requirement that you, as a worker, go by and get him and get him ready in the morning or that type thing, was there?

A No.

3487 Q All right. Is there any . . . are there any of your reports which might characterize David Buchanan's sophiscation when it comes to, as we call it, having 'street sense'?

A Possibly a psychological from Danville.

3488 Q Could you possibly check that for me, ma'am, and see whether or not there's anything in those reports with which to refer to?

A Yes.

THE COURT: Do you understand what you're looking for?

THE WITNESS: I think I'm looking [1138] for . . . or you're talking about the psychological I read initially from Danville, right?

3489 Q Yes. What I'm asking you is, I know in those reports psychiatrist and psychologist always talk in terms of scores. I'm asking you, is there any report which could determine his degree of sophiscation as it comes to maneuvering, basically, in the community where he lives?

A No.

3490 Q Anything in there that talks about a term like, conning?

A There is a report from Danville called a progress evaluation report.

3491 Q Does that report say anything with reference to conning?

A Yes.

3492 Q What does it say with reference to conning, ma'am?

A You want me to read this?

3493 Q Yes, please?

A (Witness reading from report:) As a result of this evaluation, he was determined to be a fairly sophicated youth who would be capable of manipulative, conning type behaviors. He was placed into one of our more mature sophicated groups of counselling.

3494 Q Thank you very much, ma'am. Now, counsel has [1139] asked you about several reports and he's been specific with reference to the ones he wants read. Do you have any later psychological or psychiatric reports than those that he had you to read?

A Yes, I do.

MR. HECTUS: May I approach the bench a minute, I'm not sure what the Commonwealth Attorney is referring to?

THE COURT: Yes, sir.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. HECTUS: Judge, I believe if he's going to refer to either of the evaluations that were done to determine David's competency to stand trial, those evaluations were not done to diagnose emotional disturbances and that the Commonwealth is not entitled to rely on an item when all they would say is that he is competent to stand trial. The criteria by which the two determinations are made have nothing to do with one another and furthermore, when the reports that are at the demand of both this Court and another Court. Now, I don't know whether she has a copy of that psychological that was taken in Luther Luckett, but I would submit that emotional disturbance may not impair one's competency to stand trial.

MR. JASMIN: Your Honor, the Commonwealth's position is that defense counsel has gone on about having all of those items read into the record. [1140] He's been evaluated a lot more than Miss Elam has mentioned, with reference to effects and all of this

type thing. I think the psychiatric report which was made with reference to competency to stand trial, there are evaluations or judgments made which treat the same items which he has just brought in. If I am precluded from going into that, Judge, it puts the Commonwealth in the position where defense counsel can decide which items, having to do with psychiatric or psychological evaluations the Jury can be told about. If I see another report, I can't do anything with it and the Commonwealth feels that's grossly unfair.

MR. HECTUS: Judge, if I can respond to that. That's why I put in the entire reports each time. But, these subsequent reports, have of all, are not close in time to the events as these reports were and second of all, he was not being tested for emotional diagnosis.

THE COURT: Well, the things have to do with long diagnosis, with his itentity of time, self control and things like that that Mr. Jasmin wants have to do with long standing emotional stability as well as his knowledge and I'm unable to make a clear distinction between the two. It seems to me that you can't argue about his mental status at the time of the committment of this offense and exclude evidence when he was evaluated with reference to that mental status.

MR. HECTUS: As to that mental status, it was within his ability to assist his attorney.

THE COURT: It has quite a bit to do with it because what you've gone into has to do with his intelligence, [1141] his mental ability, all of his . . .

MR. HECTUS: Judge, can I ask you to review those reports before you make a ruling on that? I don't know what's contained in those reports.

THE COURT: I don't know . . . if you want to look at them go ahead, but I'm not about to try the law suit.

MR. HECTUS: Can you show me what reports you're referring to?

MR. JASMIN: August 21, 1981.

MR. HECTUS: Okay. Lets let it in.

THE COURT: Would you show counsel subsequent reports to which you've referred? Okay. Well, I think that that's sufficient in the nature of a response to Tom's request.

MR. HECTUS: Can I see it again?

MR. JASMIN: Hold on a minute.

THE COURT: I don't know about that last paragraph there.

MR. JASMIN: You mean that one?

THE COURT: That impression.

MR. JASMIN: Well, I'll take that out, of course, it has been read in all of the other reports, the impressions, but that doesn't bother me at all.

THE COURT: We'll stipulate the impressions part.

MR. JASMIN: Can we just bring her forward and explain this to her?

MR. HECTUS: Judge, I've other grounds for objections. One, is that this would have been completed at the time David was given these test, I believe that's prejudicial [1142] because it was done at the insistence of Court and counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him as he went trial and I would cite *Estell versus Commonwealth*, which indicates that the de-

fendant has a 5th amendment right to be told that it may later be used against him and I would object on that ground, also.

THE COURT: I overrule you on that.

MR. JEWELL: This report contains references to charges that relate to Stanford, that's our only concern, Judge.

THE COURT: Nothing at all.

MR. JASMIN: Judge, do you want to call her up?

THE COURT: No, I'll just tell her.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and Court continued as follows:)

THE COURT: Miss Elam?

THE WITNESS: Yes?

THE COURT: I've sustained the objection to the part which comes under the impression, you may read the rest of the report.

QUESTIONS CONTINUED BY MR. JASMIN:

3495 Q Miss Elam, what is the date . . . what is the date of the report that you are currently going to read from, ma'am?

[1143] A August 17th, 1981.

3496 Q And, that was a psychiatric report that you received, ma'am?

A Yes.

3497 Q Leaving out the portion that was indicated by the Judge, will you read what that report says, ma'am?

A (Witness reading report:) Mental Status Exam regarding David Buchanan: Mr. Buchanan is a 17 year old black male seen on 8-14-81 at the youth center for approximately a period of one hour at the request of Judge Fitzgerald. David's past records were reviewed at DHR Offices in the Legal Arts Building prior to this interview. At the initiation, David was slightly apprehensive about why I was there but the explanation offered

seemed to delay his anxiety and he was relaxed. Rapport was reasonably good and eye contact was adequate and David was appropriate inneractionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the hear and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was . . . affect was generally shallow without imporia [1144] or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and seemed overall relaxed. And, it's signed by Robert Ryan, M.D.

3498 Q Does that complete, ma'am?

A Yes.

3499 Q Are there any other later psychological or psychiatric reports subsequent to that one of August 21st, ma'am?

A No.

3500 Q All right. Thank you very much, ma'am.

MR. JASMIN: I have no further questions.

MR. HECTUS: Judge, I have a couple of question on re-direct.

THE COURT: All right.

REDIRECT EXAMINATION:

QUESTIONS BY MR. HECTUS:

3501 Q Miss Elam, at the time of that report, David had been in custody at the detention center for some seven months, had he not?

A Yes.

[1145] 3502 Q And, what is a child's regimen at the detention center, if you know, what is the daily routine?

A I know he was in school and recreational activities.

3503 Q Do they have any sort of counseling while they're there?

A There was a social worker that saw him, I don't know how regularly.

3504 Q There was a social worker assigned to him?

A Yes.

3505 Q And, that social worker would be available at least every day, would he or she not be there everyday?

A I would think so, I don't know.

3506 Q Okay, thank you.

MR. HECTUS: I don't have any further questions.

THE COURT: All right, Miss Elam, you're now released as a witness and you're free to go. Next witness?

MR. HECTUS: Judge, defense rests.

EXHIBITS: PSYCHOLOGICAL REPORTS

DEFENDANT'S EXHIBIT A

Buchanan	David	
Last Name	First	Middle
05-19-64	Male	Black
Birthdate	Sex	Race

PSYCHOLOGICAL EVALUATION

Date of Examination: 06-03-80 CONFIDENTIAL

FOR PROFESSIONAL USE ONLY

EXAMINER(S): Carol Schultz

Tests Administered: WAIS, DAP, Bender, TAT, Rorschach

Reason for Referral:

David Buchanan is a 16-year old, black male referred for a psychological evaluation by Steve Yahnig, Director of the Lakefront Unit. The purpose of the evaluation was to aid in determining appropriate placement for David.

Background and Observations:

David was very quiet during the examination, and conveyed somewhat of a suspicious attitude; for example, he was slow to respond to questions and test stimuli; and frequently demanded that the examiner repeat questions or instructions a second time. When he did respond to test stimuli, he did not appear to take time to think about his answer. At times he repeated questions perseveratively. When performing the picture completion task David asked, "What's missing in this?" before each card. Throughout the session he appeared distant and his affect

was flat. He did not smile at any time, nor was there much variation in verbal expressions.

David's home is in Louisville, where he lived with his mother and two younger sisters. According to David, he has no difficulties at home. Although he was arrested on a charge of first degree burglary, he denies having been involved in the incident, or in previous incidents for which he was arrested. He resents being placed at the Danville Youth Development Center, as he says he did not commit the crime and does not need help. The Unit Director reports that the family supports the view of David's innocence and is generally hostile toward authority figures.

Test Results:

David obtained Full Scale, Verbal and Performance WAIS I.Q. scores of 74, 76 and 75 respectively. These scores fall in the Borderline range of intellectual functioning. Among the Verbal subtests David is markedly deficient in Verbal Comprehension. He is moderately to mildly deficient in the other Verbal areas. On the Performance subtests he displayed greater variability. He is markedly deficient in awareness of logical sequences and analysis and synthesis of nonmeaningful material, and moderately deficient in ability to distinguish essential from nonessential details. However, David displayed average ability in rapid visual-motor shifting and analysis and synthesis of meaningful material.

David's responses to projective tests suggest an individual who is isolated, mistrustful of others and interpersonally deficient. His reproductions of the Bender designs are indicative of emotional disturbance. Along with his test behavior and flat affect, his pattern of test responses suggest a mild thought disorder. He is likely to deal with his thought disturbance in a sociopathic manner. Although he tends to withdraw from others, when pushed, he becomes hostile.

Recommendations:

David's emotional disturbance and his resentment of his placement at the Danville Youth Development Center appear to militate against his success in this program. This view is reinforced by the negative attitude of the family toward David's placement here.

/s/ Carol Schultz
CAROL SCHULTZ
Examiner

/s/ Michael G. Notgal

CS:sbc
Typed: 06-11-80

NOT VALID UNLESS SIGNED

DEFENDANT'S EXHIBIT B

PSYCHOLOGICAL EVALUATION

David L. Buchanan NKTC# 2102
N/M—b. 5/19/64 DATE: August 21, 1980

David Buchanan was seen at the request of Jim Mosley, Superintendent, Northern Kentucky Treatment Center. Apparently David was recently transferred to Northern Kentucky from the Lakefront Program at Danville. He was not adjusting well to that program in terms of adapting to basic rules, regulations, and structure. In addition, his uncle, an inmate at Eddyville Penitentiary, has apparently filed several legal motions in his behalf. In any event, David is now at the Northern Kentucky Treatment Center and is being assessed relative to his current levels of emotional and/or personality functioning.

Since his social and legal history has been detailed elsewhere it will not be made an integral part of this report. However, it should be mentioned in passing that he comes from a fairly typical poor urban home in Jefferson County, and that he has been in court on multiple occasions for offenses ranging from theft over $100.00 to robbery.

A recent psychological evaluation found him to be an isolated, mistrustful, and depressed individual with a mild thought disorder. Sociopathic or psychopathic characteristics were also noted.

CURRENT OBSERVATIONS AND TEST RESULTS:

Since a recent psychological (June, 1980) was completed, a readministration of an intelligence test was not attempted at this time. Rather, this examiner focused on overall personality functioning. The House-Tree-Person, Bender-Gestalt, and a diagnostic clinical interview were presented and completed at this time.

David Buchanan presents as a quiet, rather withdrawn, and at least moderately depressed sixteen-year-old black youth. He is oriented for time, place, and person. His thinking, however, is extremely simplistic and very concrete. Impulse controls under even minimal stress are felt to be very poor. He is not seen as sophisticated, but rather as a very dependent, immature, probably pretty severely emotionally disturbed, and very easily confused youth. Short-term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Interactions with peers is likely to be extremely superficial and very guarded. David uses the pyschological defenses of projection, denial, rationalization, and isolation extensively. He will be easily led by other more sophisticated delinquents or youths. He has very limited interpersonal skills and is likely to be seen by other youth as a pawn to be used.

David's human figure drawings are extremely bizarre. Combined with his flat affect and depressed mood, as well as other suggestions of a cognitive or thought disorder, it is felt that this individual has the potential for developing a full blown schizophrenic disorder. At the present time, he is at least extremely mistrustful, suspicious, and even paranoid. He is in need of ongoing extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point of view, residential environment.

In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstances, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.

DIAGNOSIS:

Undersocialized Aggressive Conduct Disorder DSM III.

Personality Disorder (paranoid personality) (The possibility exists for regression in psychological functioning to a full blown psychotic or schizophrenic state in the future.)

Sincerely,

/s/ Robert W. Noelker, Ph.D.
ROBERT W. NOELKER, Ph.D.
Licensed Clinical Psychologist

/ma

DEFENDANT'S EXHIBIT 1

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

August 28, 1980

To: Mr. Harold Vanderhoof
Assistant Director, Residential Services

FROM: Jim Mosley
Superintendent

SUBJECT: Psychological Evaluation for
David Buchanan
N/M—dob. 5-19-64
BSS# 4241010
Admitted: 7-10-80
Jefferson County

The above named youth was transferred to the Northern Kentucky Treatment Center as a temporary domicile from the Danville Youth Development Center. A psychological evaluation was needed to make a recommendation for the appropriate program. Based on the attached psychological evaluation which was done by Dr. Robert W. Noelker, Licensed Clinical Psychologist, it is my recommendation that this youth be admitted to the Northern Kentucky Treatment Center for treatment.

If you have further questions or if I can be of further assistance to you, don't hesitate to conatct me.

sh
cc: Mr. Jeff Loane, Director, Residential Services
Ms. Martha Elam, Community Service Worker
Team Leader
Folder
File

DEFENDANT'S EXHIBIT C

DEPARTMENT OF HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

September 26, 1980

To: Ms. Martha Elam
Community Service Worker

FROM: Louis E. Busch
Juvenile Counselor

SUBJECT: Buchanan, David L.
N/M—dob. 5-19-64
BSS# 4241010
NKTC# 2102
Admitted: 7-10-80
Jefferson County

INTERIM PROGRESS REPORT

PROGRAM:

There have been no major changes in David's overall treatment program.

PERSONAL AND INTERPERSONAL ADJUSTMENTS:

David continues to be extremely resistive to all treatment methods utilized thus far. All attempts to motivate David toward self-improvement have been unsuccessful. David continues to project a self-sufficient image. David has repeatedly denied having any difficulties that he would like to obtain a better understanding of/or ability to cope with. David flatly refuses any responsibility for his past or present inappropriate behavior.

Some of the above mentioned attitude is currently being reinforced by David's uncle, an inmate at the Eddyville Penitentiary, who is filing legal motions to obtain David's release. During individual counseling sessions, David has expressed a great deal of confidence in his uncle's efforts.

Also during these sessions it is quite apparent that David is afraid to divulge any information about himself or his family life that might indicate that there are some flaws in his personality and/or his family structure.

Due to David's lack of motivation all extracurricular activities and privileges are being withheld in an effort to encourage genuine participation in therapeutic activities. David has already begun to show some signs of unrest and interest in reacquiring the fore mentioned privileges.

School personnel report that David is reading on approximately the fourth grade level and almost able to perform fifth grade math. They also report that his attitude in the classroom has been fair, but that he is reluctant to work with others. Enclosed is a copy of David's most recent report card.

PLACEMENT PLANNING:

At this time a projected placement date can not be given.

If there are any questions concerning David's treatment program or progress, please feel free to contact us.

Thank you.

Approved:

/s/ Jim Mosley
JIM MOSLEY
Superintendent

/s/ Nelson Henson
NELSON HENSON
Unit Director

sh
cc: Mr. Jeff Loane, Director, Residential Services
Mr. Harold Vanderhoof, Assistant Director
Ms. Pam McFarland, Team Leader
Mr. Jim Mosley, Superintendent
Folder
File

DEFENDANT'S EXHIBIT D

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

October 10, 1980

The Honorable Daniel A. Schneider
Jefferson District Court—Division 12
Hall of Justice
600 W. Jefferson Street
Louisville, Kentucky 40202

RE: BUCHANAN, David
N/M—b. 5/19/64
NKTC# 2102
BSS# 4241010
Admitted: 7/10/80
Jefferson County

Dear Judge Schneider,

David Buchanan was admitted to the Northern Kentucky Treatment Center on July 10, 1980, for the offense of robbery in the first degree.

While David has been residing at the Center, we have attempted to provide individual counseling which would enable him to function more positively in the community. Although we cannot predict future behavior, we certainly feel that David is better able to cope with personal problems.

David will be returning to the community sometime within the next two weeks. He will, of course, remain under the supervision of the Department for Human Resources and his Community Service Worker will be Ms. Martha Elam, 400 Legal Arts Building, Louisville, 40202.

While on supervised placement David will be expected to adhere to the following regulations and guidelines:

1. He will be expected to meet with his Community Service Worker, Ms. Elam on a regular basis.

2. He will be expected to follow any regulations which are established by his mother and Ms. Elam.
3. He will be expected to obey all federal, state and local laws.

Thank you for your cooperation in this matter and if you have any questions, don't hesitate to contact us.

Sincerely,

/s/ Nelson Henson
NELSON HENSON
Unit Director

/ma

cc: Mr. Jeff Loane, Director, Residential Services
Mr. Harold Vanderhoof, Assistant Director
Mr. Jim Mosley, Superintendent
Ms. Martha Elam, Community Service Worker
Ms. Pam McFarland, Team Leader
Folder
File

COMMONWEALTH'S EXHIBIT 2

[SEAL]

UNIVERSITY OF LOUISVILLE
Louisville, Kentucky

Department of Family Medicine

August 17, 1981

Mental Status Exam
Re: David Buchanan

ID: Mr. Buchanan is a 17-year-old black male seen on 8/14/81 at the "Youth Center" for approximately a period of one hour, at the request of Judge Fitzgerald.

David's past records were reviewed at DHR offices in the Legal Arts Building prior to this interview.

At the initiation of the interview, David was slightly apprehensive about why I was there, but the explanation offered soon allayed his anxiety and he relaxed. Rapport was reasonably good, eye contact adequate and David was appropriate interactionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the here and now, since the goal was to ascertain meeting of 202a criteria, or not. He was in good reality contact, had reasonable knowledge of current events outside the Center, and seemed to be functioning in the dull normal IQ range. Short and long term memory appeared intact. There was no evidence of hallucinations or delusions. Affects was generally shallow, without emphoria or dysphoria. He seemed somewhat optimistic about the outcome of the changes pending against him. No suicidal ideation is present, though David states he has at times been very angry at certain people (staff) at the "Center" and thought about hurting them. David wasn't especially

anxious or restless except initially, and seemed overall relaxed.

Impression: It is my opinion that David is competent to stand trial and that he presently does not meet the criteria for KRS 202a involuntary commitment.

/s/ Robert J. G. Lange
ROBERT J. G. LANGE, M.D.
DHR/BHS/MH/CTS

JEFFERSON CIRCUIT COURT
NINTH DIVISION

INSTRUCTION NO. I—MURDER

You will find the defendant, David Buchanan, guilty under this instruction, if, and only if, you find Kevin Stanford guilty under Instruction No. I, and if you further believe from the evidence beyond a reasonable doubt all of the following:

(a) That at the time the defendant, Kevin Stanford, shot and killed Baerbel Poore as set forth in Instruction No. I of the other set of Jury Instructions pertaining to Kevin Stanford, the defendant, David Buchanan was present or nearby and was assisting or encouraging or holding himself in readiness to assist the defendant, Kevin Stanford, in so doing;

(b) That in so doing the defendant, David Buchanan, intended to cause Baerbel Poore's death;

AND

(c) That when he did so he was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse under the circumstances as he believed them to be.

If you find the defendant, David Buchanan, guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or for life in your discretion.

JEFFERSON CIRCUIT COURT
NINTH DIVISION

VERDICTS FOR INSTRUCTION NO. I—MURDER

• • • •

VERDICT NO. 2

We, the Jury, find the defendant, David Buchanan, guilty of Murder under Instruction No. I and fix his punishment at confinement in the penitentiary for Life (To be served consecutively with any other sentences).

/s/ Charles B. Cornish
Foreman

JEFFERSON CIRCUIT COURT
NINTH DIVISION

No. 81 CR 1218
82 CR 0406

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs

DAVID BUCHANAN, DEFENDANT

September 17, 1982

FINAL JUDGMENT

The defendant at arraignment at arraignment having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 3, Rape I and Count 4, Sodomy I and having on the 2nd day of August, 1982, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: *VERDICT NO. 2*, WE, the JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF MURDER UNDER INSTRUCTION NO. 1 AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR LIFE (TO BE SERVED CONSECUTIVELY WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 12*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT

IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 14*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF RAPE THE FIST DEGREE UNDER INSTRUCTION NO. VII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 16*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VIII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTVELY). /S/ CHARLES B. CORNISH, FOREMAN.

On the 14th day of September, 1982, the defendant appeared in open court with his attorney, Tom Hectus, and the court inquired of the defendant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, the Defendant agreed with the factual contents of said report with the exceptional of the statement made in regards to a kitchen knife being found in the juvenile center under a toilet seat. The statement made was that the defendant placed the kitchen knife there. The defendant denies that statement.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

D. the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 533.060.

No sufficient cause having been shown why judgment should not be pronounced, IT IS ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Murder, Robbery I, Rape I and Sodomy I and is sentenced to Life on Murder, 20 Years on Robbery I, 20 Years on Rape I and 20 Years on Sodomy I. The sentences of 20 years on Robbery I, Rape I and Sodomy I are to run consecutive with each other for a total of 60 years but to run concurrent with the Life sentence for a total of Life in the Bureau of Corrections.

IT IS FURTHER ORDERED that the sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 607 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an

appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is remanded to custody.

/s/ Charles M. Leibson
CHARLES M. LEIBSON
Judge

ATTESTED: A TRUE COPY

PAULIE MILLER
Clerk

By /s/ Debbie Moore, D.C.

CC: ERNEST JASMIN
THOMAS HECTUS

SUPREME COURT OF KENTUCKY

DAVID BUCHANAN, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

June 13, 1985

OPINION

WINTERSHEIMER, Justice.

This appeal is from a judgment based on a jury verdict which convicted Buchanan of murder, robbery, rape and sodomy and sentenced him to life in prison.

The questions presented are whether the trial by a death-qualified jury where Buchanan did not face capital punishment violated due process by excluding a jury panel composed from a fair cross-section of the community, whether there was sufficient evidence to support the finding that Buchanan intended the victim's death, whether there is sufficient evidence to support a finding that he was not acting under extreme emotional disturbance at the time of the murder, whether the trial judge properly allowed the prosecution to introduce evidence of the competency evaluation, and whether the evidence of competency did violate his privilege against self-incrimination.

Barbel Poore was raped, sodomized and murdered in connection with the robbery of a gas station in Louisville on January 7, 1981. She, a 20-year-old service station attendant, was shot twice in the head. Kevin Stanford

was convicted as the trigger man. Buchanan accompanied Stanford and was also convicted of murder. Both Stanford and Buchanan were tried together. Stanford was sentenced to death, but Buchanan received a life sentence. This appeal followed.

This Court affirms the judgment of the circuit court.

In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community.

Buchanan's pretrial motion to preclude death-qualification of the jury or to postpone such *voir dire* until the penalty phase of the trial was overruled. The jury was death-qualified individually by the trial judge prior to the guilt phase of the trial. We find no merit in the argument that such a process necessarily resulted in an extraordinarily conviction-prone jury or that it excluded a recognizable group from the jury panel so as to make the panel unrepresentative of a fair cross-section of the community.

We are not persuaded by the authority of *Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D.Ark., 1980). Buchanan's arguments have been consistently rejected in other jurisdictions, *see Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir.1976); *Craig v. Wyse*, 373 F.Supp. 1008 (D.D.C.1974); *Martin v. Blackburn*, 521 F.Supp. 685 (E.D.La.1981 ; *State v. Hyman*, 276 S.C. 559, 281 S.E. 2d 209 (1981); *People v. Lewis*, 88 Ill. 2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346 (1981); *State v. Ortiz*, 88 N.M.2d 370, 540 P.2d 850 (1975); *Hovey v. Superior Court of Alameda County*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980).

People v. Kirkpatrick, 70 Ill.App.3d 166, 26 Ill.Dec. 356, 387 N.E.2d 1284 (1979) noted that no reviewing court has found any valid data indicating that a death-

qualified jury is conviction prone. A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interests of both the defendant and prosecution in presenting the case to an impartial jury. *See Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980); *Meyer v. Commonwealth*, Ky., 472 S.W.2d 479 (1971).

Buchanan's contention that death qualification excludes a cognizable group from the jury panel so as to make it unrepresentative of a fair cross-section of the community is also unconvincing. Persons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class. *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977); *Brown v. Harris*, 666 F.2d 782 (2nd Cir.1981). Opponents of capital punishment are not a distinct opinion-shaped group. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981). It was not reversible error to death-qualify the jury.

There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim.

There was testimony from Troy Johnson that Buchanan believed the robbery of the station would be easy because the victim was alone, but nonetheless supplied the bullets for the previously unloaded gun. Johnson also testified that Buchanan borrowed his brother's gun and bullets for use in the robbery, and that he did not believe Buchanan's assurances that the victim would not be harmed. Johnson had agreed to participate in the robbery until Buchanan acquired ammunition for the weapon and then Johnson refused to leave the car.

Buchanan planned the robbery; he acquired the murder weapon and the ammunition. He enlisted the assistance

of Stanford and instructed Johnson throughout the affair to remain in his car and to follow the victim's car. Buchanan had the same motive as Stanford for permanently silencing the victim. He knew that the victim could identify Stanford which meant that he would also ultimately be found. Considering the evidence as a whole, a reasonable jury could conclude that Buchanan intended the victim's death. *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530 (1977).

There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder. There is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance. The entire sequence of events indicated a cold and calculating premeditated act by Buchanan. He sought the assistance of Stanford and Johnson, obtained a gun and bullets, and timed the robbery so that the victim would be closing the station and probably alone. Certainly this was not an unplanned event. *See Brown v. Commonwealth*, Ky., 555 S.W.2d 252 (1977); *Gall v. Commonwealth, supra.*

The introduction by Buchanan of three Department of Human Resources reports is not evidence of extreme emotional disturbance. *See Wellman v. Commonwealth*, Ky., (Rendered June 13, 1985). Evidence of a mental defect alone does not support a defense of extreme emotional disturbance. *Wellman, supra.* There was sufficient evidence for a jury to find otherwise. There was a letter from DHR to Judge Snydor which noted Buchanan had benefited from treatment. The prosecution also introduced a Danville DHR report indicating that Buchanan was sophisticated, manipulative and cunning. There was also evidence of Buchanan's August 17, 1981 competency report which indicated that he was functioning normally.

The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation.

Buchanan introduced evidence of three DHR reports relating to his mental condition which had been prepared for use by juvenile authorities several months before the crimes herein. The report which Buchanan contests was cumulative to the DHR letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him. The fact that the report was made for the purpose of determining his competency to stand trial did not render the objective observations contained therein inadmissible. There is nothing to indicate that Dr. Ryan, the author of the competency report, was any less qualified than the psychologist who prepared the other DHR reports. The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the ultimate outcome of the trial. *Stiles v. Commonwealth*, Ky.App., 570 S.W.2d 645 (1978).

The evidence of Buchanan's competency report did not violate his privilege against self-incrimination. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is distinguishable from this case. In *Smith, supra*, the defendant was incriminated by his remarks to the examiner. In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearance.

When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession. *Parrish v. Commonwealth*, Ky., 581 S.W.2d 560 (1979). Any error in admitting the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the confession and the overwhelming evidence of guilt. *Stiles, supra.*

The judgment is affirmed.

All concur, except for LEIBSON, J., who did not sit.

SUPREME COURT OF THE UNITED STATES

No. 85-5348

DAVID BUCHANAN, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 27, 1986